Supreme Court, U.S.
FILED
JUL 1 - 2005
OFFICE OF THE CLERK

No. 05-42

IN THE

Supreme Court of the United States

ROBIN L. PEOPLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RECEIVED
JUL 6 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES J. SANDMAN
Counsel of Record
JAMES D. MANGIAFICO

ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions and Orders Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Trial, Post-Trial Motions, and Direct Appeals 4

B. Section 2255 Motion and Appeal 5

Reasons for Granting the Writ 7

A. The Circuits Are Divided over Whether an Ineffective Assistance Claim Decided on Direct Appeal Bars a Subsequent Ineffective Assistance Claim, Based upon Different Grounds, in a Motion Pursuant to §2255 8

B. The Decision Below Conflicts in Principle with this Court's Decision in *Massaro* 11

C. The Decision Below Reflects a Misunderstanding of this Court's Decisions Regarding the Applicability of the Law of the Case Doctrine to First Motions Pursuant to §2255 13

Conclusion 16

Appendix

TABLE OF AUTHORITIES

Cases: Page

Billy-Eko v. United States, 8 F.3d 111 (2d Cir. 1993)..... 9
Castro v. United States, 540 U.S. 375 (2003)..... 16
Davis v. United States, 417 U.S. 333 (1974).....8, 13-16
Guinan v. United States, 6 F.3d 468 (7th Cir. 1993)..... 11
Kaufman v. United States, 394 U.S. 217 (1969)..... 14
Massaro v. United States, 538 U.S. 500 (2003) ..... passim
Pitcher v. United States, No. 03-CV-3174, 2005 WL 1278451 (E.D.N.Y. May 31, 2005) 10
Portello v. United States, 113 F.3d 1230 (table), *available at* 1997 WL 218780 (2d Cir. 1997) 9
Reed v. Farley, 512 U.S. 339 (1994) 14
Riascos-Prado v. United States, 66 F.3d 30 (2d Cir. 1995) ... 9
Sanders v. United States, 373 U.S. 1 (1963)..... 14-15
Strickland v. Washington, 466 U.S. 668 (1984) 5
United States v. Frady, 456 U.S. 152 (1982)..... 13
United States v. Galloway, 56 F.3d 1239 (10th Cir. 1995). 7, 8
United States v. Horne, 203 F.3d 53 (table), *available at* 2000 WL 60246 (D.C. Cir. 2000)..... 15
United States v. Taglia, 922 F.2d 413 (7th Cir. 1991)..... 6
Withrow v. Williams, 507 U.S. 680 (1993)..... 14

Other Authorities:

28 U.S.C. §2255..... 14
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 15
Transcript of Oral Argument, *Massaro v. United States*, 538 U.S. 500 (2003) (No. 01-1559) 2003 WL 840200 12

IN THE

Supreme Court of the United States

ROBIN L. PEOPLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Robin L. Peoples respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in this case, entered on April 6, 2005.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 403 F.3d 844 (7th Cir. 2005) and is reproduced in the Appendix ("App.") at 60a. The Order of the court of appeals granting a certificate of appealability is unreported and is reproduced in the App. at 58a. The district court's Memorandum and Order denying petitioner's §2255 motion is unreported and is reproduced in the App. at 37a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 6, 2005. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Section 2255 of Title 28, United States Code, provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the assertion of ineffective assistance of counsel on direct appeal and in motions pursuant to 28 U.S.C. §2255. This area of the law has presented considerable difficulties, some of

which were recently resolved by the Court in *Massaro v. United States*, 538 U.S. 500 (2003). *Massaro* explicitly declined to reach the question whether one who raises an ineffective assistance claim on direct appeal may raise the claim on different grounds in a first motion under §2255. This question has caused a conflict among the circuit courts, which the petitioner now respectfully asks this Court to resolve.

Claims of ineffective assistance of counsel present thorny procedural difficulties for litigants and for courts. The policies governing the timing of ineffective assistance claims, which are commonly said to be best brought in a collateral proceeding,[1] are at odds with the general policies encouraging the prompt assertion of grounds for appeal. The result has been confusion and disagreement in the lower courts.

This Court took an important step toward resolving these difficulties in *Massaro*, which held that "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under §2255." 538 U.S. at 509. But as the Court noted then, there may be cases in which "appellate counsel will consider it advisable to raise the issue on direct appeal" or when "obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Id.* at 508. In those cases, the Court explained, "certain questions may arise in subsequent proceedings under §2255 concerning the conclusiveness of determinations made on the ineffective-assistance claims raised on direct appeal; but these matters of implementation are not before us." *Id.* at 508-09. These very matters of implementation are presented here.

---

[1] *See, e.g., Massaro*, 538 U.S. at 504 ("In light of the way our system has developed, in most cases a motion brought under §2255 is preferable to direct appeal for deciding claims of ineffective-assistance.").

A. Trial, Post-Trial Motions, and Direct Appeals

Robin Peoples and three codefendants were indicted for various offenses relating to four bank robberies and the destruction of two getaway vehicles. Although each of his codefendants entered into a plea agreement with the government, Peoples asserted his innocence, proceeded to trial, and was convicted by a federal jury.[2]

Before sentencing, Peoples filed a motion for appointment of new counsel, which the district judge granted. Peoples also filed a motion for a new trial pursuant to Fed. R. Crim. P. 33. (His first such motion was stricken because it was not filed through counsel of record. Peoples promptly filed a second motion for new trial. *See* App. at 1a.) In support of the motion for new trial, Peoples argued, *inter alia*, that he was denied effective assistance of counsel. The district judge conducted an evidentiary hearing but denied the motion, concluding that trial counsel had not been ineffective. *See id.* at 5a-11a. Peoples was later sentenced to over 100 years' imprisonment.

Peoples appealed his conviction to the United States Court of Appeals for the Seventh Circuit, at which point his new counsel argued Peoples's claim of ineffective assistance of trial counsel. The court of appeals rejected the argument, finding that "the record contains no evidence demonstrating that trial counsel rendered substandard assistance or caused actual prejudice to Peoples's defense." *Id.* at 19a. Peoples later filed a petition for writ of certiorari with this Court, which was denied. *Id.* at 22a.

While the appeal from his conviction was pending, Peoples, as a *pro se* litigant, filed a third motion for new trial based on

---

[2] Mr. Peoples was convicted of four counts of armed bank robbery in violation of 18 U.S.C. §2113(d), four counts of using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §924(c), two counts of using fire to commit a federal felony in violation of 18 U.S.C. §844(h), and two counts of destroying a vehicle by means of fire in violation of 18 U.S.C. §844(i).

newly discovered evidence of ineffective assistance of trial counsel. The district court denied that motion on the same basis as its ruling on Peoples's second motion for new trial. *See id.* at 27a-28a. Thereafter, Peoples appealed the denial of his third motion for new trial and represented himself on appeal. The Seventh Circuit affirmed, holding that Peoples's new evidence of ineffectiveness did not "describe any errors serious enough to implicate his attorney's performance under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984)." *Id.* at 32a.

B. Section 2255 Motion and Appeal

While his second appeal was pending, Peoples filed a motion pursuant to 28 U.S.C. §2255 on the grounds of ineffective assistance of both trial and appellate counsel, alleging new grounds for his counsel's ineffectiveness and requesting an evidentiary hearing to develop a supporting record.[3] The district court denied Peoples's §2255 motion without an evidentiary hearing, on the grounds that the law of the case doctrine barred the court from considering theories of ineffectiveness of trial counsel that Peoples had presented or

---

[3] In his first motion for new trial and appeal, Peoples based his claim of ineffective assistance of counsel on contentions that his lawyer was under the influence of alcohol at trial, had not prepared adequately for trial, and failed adequately to object to potential jurors and to the panel that produced an all-white jury. *See* App. at 5a-10a, 19a-20a. In a subsequent motion for new trial, Peoples claimed that his lawyer's mental condition rendered him unable to provide effective assistance, based on newly discovered evidence relating to his lawyer's suicide. *See id.* at 27a-28a, 32a. In his §2255 motion, Peoples claimed ineffective assistance based on his lawyer's alleged conflict of interest, failure to object to prosecutorial misconduct, failure to request a flight instruction, and misstatements regarding a co-defendant's gang involvement. *See id.* at 39-40a, 43a-46a. The district court conducted an evidentiary hearing following Peoples's initial motion but not following his motion based on newly discovered evidence or following his §2255 motion.

could have presented on direct appeal,[4] that Peoples had defaulted his new theories of ineffective assistance for failing to raise them on direct appeal,[5] and that Peoples's counsel did not render ineffective assistance. *See* App. at 39a-48a.

Soon after the denial of his §2255 motion, Peoples filed a motion to reconsider in light of this Court's decision in *Massaro*, which effectively overruled the procedural default rule upon which the district court had relied. The district court denied Peoples's motion for reconsideration, stating that "though this was one reason why Mr. Peoples's § 2255 petition was denied, it was only one of many reasons, so the outcome of his petition would not change." *Id.* at 54a. The Seventh Circuit then granted Peoples's application for a certificate of appealability and specifically asked the parties to address how this Court's decision in *Massaro* affected the appeal. *See id.* at 58a.

On appeal, the Seventh Circuit declined to reach the merits of Peoples's ineffective assistance claim, holding that the law of the case doctrine barred him from asserting it. *See id.* at 62a. The court of appeals found it irrelevant that Peoples's §2255 motion presented new grounds for his ineffective assistance claim: having raised an ineffective assistance claim before, Peoples was barred from presenting "new theories as well as old ones." *See id.* at 61a. The Seventh Circuit distinguished *Massaro*, writing:

> The [U.S. Supreme] Court held in *Massaro* that a defendant never forfeits a claim of ineffective assistance

---

[4] "Because Mr. Peoples has not presented good grounds for disregarding the law of the case, that doctrine bars theories of ineffective assistance he could have offered in his prior appeals but didn't." App. at 41a.

[5] "The law of the case has its own finality, but Mr. Peoples's choice not to raise these errors during his two prior appeals has the effect of procedurally defaulting his § 2255 petition." *Id.* at 42a. At the time of Peoples's §2255 motion, this Court had not yet decided *Massaro*, and the law of the Seventh Circuit was that "the failure to raise an issue on direct appeal bars the defendant from attempting to raise it later, in a postconviction proceeding." *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991).

> by waiting until collateral attack.... But *Massaro* does not hold that the same ground of relief may be raised *twice*, once on direct appeal and again on collateral review. The question was left open.

Id. at 64a (emphasis in original). The Seventh Circuit concluded with a discussion of the Tenth Circuit's decision in *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995), which held that an ineffective assistance of counsel claim on direct appeal does not bar the assertion of a subsequent ineffectiveness claim, based on different grounds, in a first motion pursuant to 28 U.S.C. §2255. Acknowledging that the Tenth Circuit "sees this issue differently," the Seventh Circuit insisted that *Galloway* "does not persuade us to abandon the doctrine of law of the case in federal collateral review under §2255." *Id.* at 66a.

REASONS FOR GRANTING THE WRIT

The decision below creates a conflict between the law of the Seventh Circuit and that of the Second and Tenth Circuits. The Tenth Circuit has held that an ineffective assistance of counsel claim on direct appeal does not bar the assertion of a subsequent ineffectiveness claim, based upon different grounds, in a first petition filed pursuant to 28 U.S.C. §2255. And the Second Circuit has adopted a similar rule. The court below, acknowledging its difference with the Tenth Circuit, held otherwise.

In addition, the decision below conflicts in principle with this Court's recent jurisprudence on ineffective assistance of counsel and collateral review. In *Massaro*, this Court recognized specific policy considerations governing whether ineffective assistance claims should be brought on direct appeal or in a collateral proceeding. These considerations were overlooked in the opinion below.

Finally, review of this case would allow the Court to clarify the extent to which the law of the case doctrine applies to first §2255 motions. This Court has addressed the issue in dicta,

but engaging it directly would resolve confusion within the courts of appeals, including the Seventh Circuit's misunderstanding of this Court's holding in *Davis v. United States*, 417 U.S. 333 (1974).

A. The Circuits Are Divided over Whether an Ineffective Assistance Claim Decided on Direct Appeal Bars a Subsequent Ineffective Assistance Claim, Based upon Different Grounds, in a Motion Pursuant to §2255

The decision below creates a conflict in the circuits over whether a claim of ineffective assistance of counsel decided on direct appeal bars the assertion of a subsequent ineffective assistance claim, based upon different grounds, in a first motion pursuant to 28 U.S.C. §2255. The Second and Tenth Circuits permit an ineffective assistance claim to be brought in a §2255 motion if adjudicated on other grounds on direct appeal. The Seventh Circuit held otherwise, acknowledging its difference with the Tenth Circuit.

In *United States v. Galloway*, the Tenth Circuit, sitting en banc, decided that "an ineffective assistance of counsel claim on direct appeal does not bar the assertion of a subsequent ineffectiveness claim, based on different grounds, in a first petition filed pursuant to 28 U.S.C. §2255." 56 F.3d at 1242. The Tenth Circuit concluded that procedural bars to raising ineffective assistance claims should be avoided because they are easy to circumvent and labor-intensive to evaluate. "The usual tactic to force a second review," the court explained, "is to claim in a post-conviction proceeding that appellate counsel was ineffective for failing to advance all possible reasons showing why trial counsel was ineffective." *Id.* at 1241. Because courts are invariably compelled to evaluate the underlying claim of ineffective assistance of trial counsel, even if indirectly, the Tenth Circuit determined that its resources would be better spent reaching the merits directly and dispensing with unnecessary procedural rules. *See id.*